IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF IOWA DAVENPORT DIVISION

BETTY ROUDYBUSH)	
Plaintiff,)	CIVIL NO. 3:01-cv-30018
)	
VS.)	
)	
LOUISA COUNTY BOARD OF)	RULING ON DEFENDANTS'
SUPERVISORS, JEFF STORY,)	MOTION FOR SUMMARY JUDGMENT
JACK ESTLE and FORREST)	
BARTENHAGEN,)	
)	
Defendants.)	

This matter is before the Court on defendants' motion for summary judgment. This is an action under Title VII, 42 U.S.C. § 2000e, et seq., and the Americans with Disabilities Act (ADA), 42 U.S.C. § 12100, et seq. with pendent state claims under the Iowa Civil Rights Act (ICRA), Iowa Code ch. 216, et seq. The parties consented to proceed before a United States Magistrate Judge and the case was referred to the undersigned for all further proceedings on June 18, 2001. See 28 U.S.C. § 636(c).

Ms. Roudybush advances claims of discriminatory termination of employment based on her gender and a failure to accommodate a disability under both federal and state law. Defendants' motion is directed at all counts. The motion is fully submitted.

Defendants are entitled to summary judgment if the affidavits, pleadings, and discovery materials "show that there is no genuine issue as to any material fact and that [defendants are] entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c).

Although we view the facts in a light most favorable to the non-moving party, in order to defeat a motion for summary judgment, the non-moving party cannot simply create a factual dispute; rather, there must be a genuine dispute over those facts that could actually affect the outcome of the lawsuit.

Carter v. St. Louis University, 167 F.3d 398, 400 (8th Cir. 1999).

"[M]ere allegations which are not supported with specific facts are not enough to withstand [a motion for summary judgment]." Klein v.

McGowan, 198 F.3d 705, 709 (8th Cir. 1999).

This case deals with employment relationships. Motions for summary judgment in employment cases should be approached with caution because such cases "often depend on inferences rather than on direct evidence." Jacob-Mua v. Veneman, 289 F.3d 517, 520 (8th Cir. 2002); EEOC v. Woodbridge Corp., 263 F.3d 812, 814 (8th Cir. 2001); Crawford v. Runyon, 37 F.3d 1338, 1341 (8th Cir. 1994) (citing Johnson v. Minnesota Historical Soc">Johnson v. Minnesota Historical Soc", 931 F.2d 1239, 1244 (8th Cir. 1991)). See also Webb v. St. Louis Post-Dispatch, 51 F.3d 147, 148 (8th Cir. 1995); Hardin v. Hussmann Corp., 45 F.3d 262, 264 (8th Cir. 1995); Kunzman v. Enron Corp., 902 F. Supp. 882, 892 (N.D. Iowa 1995). Still, summary judgment "remains a useful

pretrial tool to determine whether or not any case, including one alleging discrimination, merits a trial." Berg v. Norand Corp., 169 F.3d 1140, 1144 (8th Cir.), cert. denied, 528 U.S. 872 (1999); see Woodbridge, 263 F.3d at 814 (summary judgment proper when plaintiff fails to establish factual dispute on essential element); Snow v. Ridgeview Medical Ctr., 128 F.3d 1201, 1205 (8th Cir. 1997) ("summary judgment is proper when a plaintiff fails to establish a factual dispute on an essential element of her case").

II.

The following facts are undisputed or are viewed in a light favorable to plaintiff. The Court has had some difficulty with the factual record as the parties have not prepared appendices which conform to the local rule, particularly the requirement of consecutive pagination. LR 56.1(e). Defendants have not replied to plaintiff's statement of additional material facts that she contends preclude summary judgment, therefore, in accordance with LR 56.1(b), those facts, to the extent they would be admissible, are deemed to be admitted for the purposes of the motion.

Plaintiff Betty Roudybush was hired by the Louisa County Board of Supervisors (hereinafter "the Board") in 1988 as the Zoning Administrator, a part-time, three-day a week job. Subsequently, Ms. Roudybush was assigned other duties, including Flood Plain Administrator, County Sanitarian and 911 Map Coordinator, increasing her time on the job to four days a week.

Defendant Jack Estle was elected to the Louisa County Board of Supervisors in 1989. Defendant Jack Story was elected to the Louisa County Board of Supervisors in 1997. Defendant Forrest Bartenhagen was elected to the Louisa County Board of Supervisors in 1999.

On February 3, 2000 the Board passed a resolution eliminating plaintiff's position. Her responsibilities were split among other county departments. Defendants claim plaintiff's position was eliminated to save the County money.

Plaintiff alleges that throughout her tenure with the County, particularly in the 1990's, she was subjected to ongoing harassment and hostility in the workplace. In Answers Interrogatories she has claimed that the culture of the Board was one of "cronyism," "old-boyism," and gender-based favoritism. (Ex. 1 at 4). Roudybush says she was repeatedly and purposefully verbally harassed by defendant Estle, particularly during the course of her divorce in 1994. She claims Estle made negative comments to her and to others behind her back about her after-hours activities with a female friend and about her evening job as a bartender, suggesting these activities were improper for a woman, and that he asked pointed questions about her dating activities in the presence of other supervisors and County employees. Ms. Roudybush claims that on one occasion, while she was in his office, Estle took a telephone call and began to fondle himself in her

presence. When discussing plaintiff's activities, Estle would ask if she had checked with "the men" at DNR or FEMA, agencies with which she worked, before making a decision or taking some action and on one occasion suggested some government documents were to complex for her to understand. Approximately two years before Roudybush was terminated, Estle visited with other County employees outside plaintiff's presence. One of those employees reported to her that Roudybush was on thin ice at that time and would be fired.

Roudybush complains that to get along with defendant Jeff Story, women had to flirt with him, which she refused to do. When meeting her in his office, Roudybush states that Story would tilt back in his chair with his legs wide open. Roudybush perceived that another female employee had more influence with Story because she dressed in a provocative manner. Roudybush claims Story singled her out for hostile and abusive treatment because she had, in her official capacity, been involved in a decision by the Board of Health to shut down a rental property Story managed.

On or about February 20, 1999 Roudybush complained to defendant Forrest Bartenhagen regarding Story's behavior and her belief that Story harassed her because she was an unmarried female.

While Bartenhagen behaved more professionally than Estle and Story, Roudybush complains that he, too, refused to take her seriously or accord her professional respect, often second-guessing

her decisions. On at least one occasion he showed anger towards her at a public meeting.

On January 7, 1999 the Board issued a memorandum to Roudybush requesting that she prepare daily reports of her activities while working for the County. No male employees were required to make such reports. (Pl. Ex. 15).

On or about May 13, 1999, approximately seven (7) months before the County terminated plaintiff, Bartenhagen told her Estle would get her fired if she did not back off on enforcing DNR rules against a friend and cousin of Estle's. Bartenhagen told Roudybush to "get it settled" before Story got going on his problem against her over his rental property. At this point Roudybush contacted an attorney.

According to Roudybush, the County Assessor Greg Johnson was hostile towards her. He referred to women working in the county offices as "his girls" and he referred to Roudybush in the same way. On occasion, Roudybush told Johnson that he should "get with the program" and not refer to women employees as "girls," but Johnson laughed her off. In a public meeting reported in the local newspaper on June 29, 2000 Johnson referred to the women in his office as "my ladies." (Ex. 3).

In August 1998 then-Supervisor Jim Crawford told Roudybush Estle and Story wanted her gone. Dale Rickert also

reported that Story had publicly stated his desire to see her fired.

There was no policy, process or procedure in Louisa County by which Roudybush could make a complaint about discrimination and hostility in the workplace. When she approached Supervisors and County employees about their conduct, her concerns were brushed off and not taken seriously, and Roudybush would be subjected to further harassment. Eventually she began joking along with the men to get past their conduct and comments.

Sometime between 1994 and 1996 mold began to grow in plaintiff's office and when she made complaints, Supervisors Warren Kemper, Estle and Jim Crawford called her a "nag." They would also snicker or laugh at her or shake their heads. During her divorce, Supervisor Kemper made insulting personal comments about her husband and his personal behavior, including one comment about the ex-husband having to be "pulled off" a female. As Roudybush describes it, the supervisors repeatedly teased and tormented her during her divorce proceedings.

Defendant Story sought out women in the courthouse with whom he could flirt, which made Roudybush uncomfortable. Estle would come into the bar where she was working and publicly joked to other supervisors that he was going into the bar to "see what Betty was doing."

The Board withheld approval for Roudybush to travel to out-of-state educational courses, but allowed Greg Johnson to use county funds for his own travel and that of other county employees picked by him.

During her employment with the County, Roudybush took several medications for stress and depression, both anti-anxiety and anti-depression medications. She claims the Supervisors, particularly Estle and Story, went out of their way to call attention to her mental health issues and to publicly mock her. Warren Kemper made public comments such as "Are you on those pills today? They make you goofy." Estle would ask Roudybush daily about her personal life and make comments about her red, swollen eyes, attributing her condition to staying out too late when in fact they were caused by her allergies.

In 1987 or 1988 when Roudybush was first assigned her office in the Louisa County Courthouse, she noticed there were water stains of some sort in the paint. The walls and ceiling were discolored and in need of paint. In about 1992 she began to notice physical problems when she was at work in her office. She became lightheaded and lethargic and started having headaches and feeling like she had to get fresh air. After the heavy rains of 1993, the paint on the walls of her office began to bubble and blister. Roudybush reported her concerns to the Board and to the courthouse

janitor. The condition grew increasingly worse, gaining a bluishgreen color in some areas.

For several years Roudybush asked the Board to do something about her office walls. In 1997 or 1998 the Board authorized the painting of her office walls. Before this time, she would stand on a chair with a yardstick and knock pieces of painted wall down so they did not fall on her. She also sprayed the walls with bleach.

By 1996 Roudybush's physical condition had become worse. Her face and head hurt, she had frequent sore throats and sinus infections and she would get headaches after an hour or so in the office. During this time frame she began treating with an allergist, Dr. Little. Dr. Little attributed Roudybush's condition to mold in her office. Both the doctor and Roudybush conveyed this information to the Board. Sometime between 1995 and 1997 she went to the Board and offered to move to a vacant location within the courthouse. Her request was refused. The painting of plaintiff's office failed. In 1999 new wallboard was put up over the moldy areas and the roof was repaired. After a few months, the wallboard also failed. Roudybush purchased a portable air filter with a HEPA filter for her office at her own expense. Defendant Story's attitude regarding Roudybush's complaints about her office was that he wanted "the woman at work to quit her bitching."

On March 8, 1996 Dr. Little, plaintiff's allergy specialist, sent a letter to the County confirming plaintiff had allergic sensitivities "to dust mites, mold and pollens. Water damaged ceiling, wall paneling or flooring (especially carpeting) is likely to promote dust mite and mold growth and, therefore, may cause allergic symptoms." (Pl. Ex. 5) In response to the letter the County refused plaintiff's efforts to improve her office space or relocate.

On September 5, 1997 Dr. Little prepared another letter for Roudybush's employer which advised "[Roudybush] should avoid heavy exposure to allergens, especially indoors at work and home. Any water leakage or drainage problems in the home or workplace should be corrected since pooled water or chronically moist areas greatly increase indoor mold and dust mite levels." (Pl. Ex. 7).

On January 24, 2000 Roudybush's office was tested by the University of Iowa College of Public Health. Roudybush claimed she had received permission from Estle for this testing to be done. (Pl. Ex. 9). The testing report indicated high levels of moisture and molds. (Pl. Ex. 10). The Board subsequently issued a letter to Roudybush stating the work had not been authorized and sending the testing bill to her. (Pl. Ex. 11).

On January 31, 2000 the Board met and decided to terminate Roudybush. (Pl. Ex. 12). Estle stated there would be no increase in compensation for those to whom her duties were

assigned. In March 2000 the Louisa County Board of Health publicly expressed concern that they had not been consulted prior to plaintiff's termination and expressed concern that the job of county sanitarian had been assigned to the secondary roads department. (Pl. Ex. 13). In April 2000 the Board questioned the ability of the secondary roads department to handle the sanitarian's duties. (Pl. Ex. 14). On April 24, 2000 the county employees to whom the Board had assigned plaintiff's duties as zoning administrator told the Board they were not prepared to deal with health violations and did not have the knowledge to address complaint calls. The Board discussed sending a male employee, Ron Johnston, for training and Bartenhagen suggested other counties could help out (Pl. Ex. 16). On May 30, 2000 the Board considered requests by Greg Johnson and Carol Nixon for increased salaries based on their additional duties of zoning and 911 administration. (Pl. Ex. 17). Eventually the Board authorized pay increases for the departments to which Roudybush's duties had been assigned. (Pl. Ex. 18).

Since her termination, Roudybush has worked part-time in a friend's restaurant, and is now attempting to work in real estate sales. She is unable to show any home with a wet basement or other water or potentially mold-related issue. She has never filed a workers' compensation claim against the County.

A. <u>Discriminatory Termination Based on Gender</u>

Roudybush appears to advance two sex discrimination claims: disparate treatment in that a motivating factor for her discharge was gender, and sexual harassment (hostile work environment). Defendants' motion is directed at the disparate treatment claim and accordingly, plaintiff's allegations of sexual harassment are not before the Court.

Defendants' motion in part argues that most of the conduct which Roudybush alleges shows a gender basis for her discharge is not specific as to time or outside the limitations period and therefore is not actionable. In National Railroad Passenger Corp. v. Morgan, ____ U.S. ____, 122 S. Ct. 2061 (2002), the Supreme Court stated "discrete discriminatory acts are not actionable if time barred, even when they are related to acts alleged in timely filed charges. Each discrete discriminatory act starts a new clock for filing charges alleging that act." Id. at 2071. "Discrete acts" include such events as "termination, failure to promote, denial of transfer or refusal to hire." Id. Roudybush's discharge was a discrete act but it is not time-barred. Plaintiff may point to statements and conduct outside the limitations period as evidence of a gender motive with respect to an adverse employment action within the limitations period. Cf. Smith v.

<u>Ashland, Inc.</u>, 250 F.3d 1167, 1173 (8th Cir. 2001); <u>Gipson v. KAS</u> <u>Snacktime Co.</u>, 171 F.3d 574, 579 (8th Cir. 1999).

To establish a prima facie case of discriminatory discharge based on gender Roudybush is required to show (1) that she is in a protected class; (2) that she was qualified to perform her job; (3) that she suffered an adverse employment action; and (4) that she was replaced by someone not in the protected class or otherwise, that the circumstances of the discharge permits an inference of discrimination. Habib v. NationsBank, 279 F.3d 563, 566 (8th Cir. 2001); Britton v. City of Poplar Bluff, 244 F.3d 994, 996 (8th Cir. 2001); Keathley v. Ameritech Corp., 187 F.3d 915, 921 (8th Cir. 1999) (elements of prima facie case vary and flex). Iowa courts analyze claims of discrimination under the same model. Falczynski v. Amoco Oil Co., 533 N.W.2d 226, 230 n.2 (Iowa 1995).

Defendants' motion targets the fourth element. They note plaintiff was not replaced by a male, rather her job duties were split among existing employees, including one female. It is also the case, however, that the County Assessor, a male, acquired one of plaintiff's primary job functions. The fact that another female was assigned some of plaintiff's duties is not dispositive. Chock v. Northwest Airlines, Inc., 113 F.3d 861, 863 n.1 (8th Cir. 1997); Williams v. Ford Motor Co., 14 F.3d 1305, 1308 (8th Cir. 1994) ("gender of the employee who replaced the plaintiff goes to the weight of the evidence as opposed to its legal sufficiency").

There is no per se rule, the circumstances of each case must be analyzed. Here, the fact that significant job responsibilities, formerly performed by Roudybush, were assigned to a male, coupled with the claimed interest of Board members and others in her divorce and personal life, the disparagement and dismissive attitude which Roudybush says characterized her dealings with the Board members and certain other male employees, are enough to overcome the less than onerous burden of establishing a prima facie case. Simmons v. New Public School District No. 8, 251 F.3d 1210, 1217 (8th Cir. 2001).

Once a prima facie case is established, defendant must articulate a legitimate non-discriminatory reason for the action against plaintiff. Britton, 244 F.3d at 996-97. Defendants have done so. They assert elimination of Roudybush's position and distribution of her duties to others was a cost-cutting measure.

A non-discriminatory reason having been given, Roudybush must produce sufficient evidence from which the jury could conclude defendants' reason was not true and that plaintiff's gender was the real reason. See O'Sullivan v. Minnesota, 191 F.3d 965, 969 (8th Cir. 1999). Evidence of pretext may permit the trier of fact to find intentional discrimination. St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 511 (1993). Plaintiff has pointed to evidence in the summary judgment record to the effect that within months of dividing her duties, the persons who acquired those functions

sought and received raises for the extra work. That there was little or no savings is, arguably, evidence that cost savings was not the true reason. That does not necessarily mean the evidence is sufficient to show gender was a motivating factor, but when put together with evidence that Board members Story and Estle had expressed a desire to terminate Roudybush, the disparaging and dismissive attitude toward her and the comments about her personal life referred to above which lend a patina of gender, the Court cannot find the absence of a genuine issue of material fact about defendants' motive.

B. <u>ADA - Failure to Accommodate</u>

Plaintiff's second cause of action under Counts III (federal law) and IV (state law) is for failure to accommodate a disability. Roudybush claims that as a result of exposure to damp and moldy conditions in her office at the Louisa County Courthouse, she developed (or suffered exacerbation of) allergies to dust mites, molds and pollens. Defendants challenge whether plaintiff's allergies are a disability within the meaning of the ADA and parallel ICRA provisions. Here again the federal and state legal standards are the same.

 $^{^1}$ The Iowa Supreme Court "look[s] to the ADA and underlying federal regulations in developing standards under ICRA for disability discrimination claims." Bearshield v. John Morrell & Co., 570 N.W.2d 915, 918 (Iowa 1997).

The first element an ADA plaintiff must establish is that he or she is disabled within the meaning of the statute. <u>See Dropinski v. Douglas Co., Neb.</u>, 298 F.3d 704, 706 (8th Cir. 2002).

As applicable here, "disability" is statutorily defined as "a physical or mental impairment that substantially limits one or more major life activities of [the] individual." 42 U.S.C. § 12102(2)(A). The existence of a disability is determined on a case-by-case basis. Albertson's Inc. v. Kirkingburg, 527 U.S. 555, 566 (1999). Roudybush has a physical impairment, allergies. The issue is the sufficiency of the evidence to permit a finding that her allergies substantially limit one or more major life activities. In her briefing Roudybush identifies the relevant major life activity as "breathing" and suggests the major life activity of "working" is also involved. (Pl. Brief at 18). The Court has considered both.

The existence of medical conditions does not in itself render an individual disabled for purposes of a disability discrimination claim. See Sutton v. United Air Lines, Inc., 527 U.S. 471, 483 (1999) (myopics not per se disabled); Orr v. Wal-Mart Stores, Inc., 297 F.3d 720, 723-24 (8th Cir. 2002) (analysis of diabetic and disability); Weber v. Strippit, Inc., 186 F.3d 907, 913 (8th Cir. 1999), cert. denied, 528 U.S. 1078 (2000) (heart

 $^{^{\}rm 2}$ Roudybush does not claim that her history of depression has resulted in a disability.

disease did not automatically render plaintiff disabled). An impairment must "substantially limit" a major life activity.

Factors to be considered when assessing whether an individual is substantially limited in a major life activity are: (i) the nature and severity of the impairment; (ii) the duration or expected duration of the impairment; and (iii) the permanent or long term impact, or the expected long term impact of or resulting from the impairment.

Hiller, 95 F. Supp. 2d at 1021 (citing Weber, 186 F.3d at 913);
see 29 C.F.R. § 1630.2(j)(2).

Plaintiff's claimed disability, allergies, has been discussed in several cases. In Selenke v. Medical Imaging of Colorado, 248 F.3d 1249 (10th Cir. 2001), plaintiff suffered from chronic sinusitis. her position Ιn as а radiology technician/mammographer she was required to spend approximately an hour and a half per day in the darkroom developing x-rays. The fumes from that process aggravated her condition and plaintiff complained regularly about the fumes. After three or four months of complaints, plaintiff consulted an industrial hygienist whose inspection confirmed there was no ventilation in the room. At that point the employer installed a ceiling vent. The business moved to new facility and again plaintiff had complaints about sufficient ventilation in the darkroom. Changes in the ventilation system were made, but plaintiff continued to have problems, leading her physician to suggest testing for molds and spores. Id. at 1253. After plaintiff was terminated for other reasons, she brought suit

against the employer, claiming she was terminated on the basis of her disability and that the employer had failed to accommodate her. <u>Id.</u> at 1254. Defendant first argued plaintiff was not disabled under the ADA. Plaintiff claimed to be impaired in the major life activities of breathing and working. Id. at 1258. Because plaintiff admitted she was able to perform all of her job duties at the time she was terminated there was no evidence in the summary judgment record that she was unable to perform "'either a class of jobs or a broad range of jobs in various classes as compared to the average person.'" Id. at 1258 (quoting 29 C.F.R. § 1630.2(j)(3)(i)). With respect to the major life activity of breathing, however, there was evidence in the summary judgment record that her sinusitis affected her breathing "by causing her increased health risks upon exposure to certain conditions in the darkroom." Id. at 1259. The court assumed, without deciding, that plaintiff had presented sufficient evidence of a substantial impairment in the major life activity of breathing.

In <u>EEOC v. UPS</u>, 249 F.3d 557 (6th Cir. 2001), <u>cert.</u> denied, 122 S. Ct. 1203 (2002), plaintiff driver had been working in Texas for many years when he developed a severe allergy to a plant found only in that part of the country. His reactions to the pollen were severe, "including fever, swollen eyes, nasal congestion, fever blisters, rashes, lung congestion, fatigue, and depression, making it difficult for him to breathe, eat, and

sleep." Id. at 560. Plaintiff sought a transfer out of the area to another UPS facility, which was denied. Ultimately he quit his job with disputed assurances he could be hired at his new location — he was told there UPS policy forbid rehiring former employees. In summary judgment proceedings in his subsequent lawsuit, there was evidence that at the time he requested a transfer plaintiff could hardly leave his home and spent his non-work hours in bed as "he suffered with severe nasal and bronchial congestion, swollen eyes and nose, rashes and fever blisters over large areas of his body, fatigue, fever, and depression." Id. at 562-63. On this basis the court found plaintiff was disabled within the meaning of the statute. Id. at 563. Summary judgment was denied based on genuine issues of material fact on the remaining elements of his ADA claim.

In Land v. Baptist Medical Center, 164 F.3d 423 (8th Cir. 1999), a day care center refused to provide services to a child with an allergy to peanuts. Plaintiff claimed the allergy affected the major life activities of eating and breathing. The Eighth Circuit found her allergy did not substantially limit either function: although plaintiff could not eat foods containing peanuts or their derivatives, there was no showing she had any allergic reaction when she ate other foods or that she was otherwise restricted in eating. As for breathing, she suffered two episodes of splotches and hives after encountering peanut products at the daycare, but her ability to breathe otherwise was unrestricted. Id.

at 424. Because her allergy did not "substantially or materially limit" either major life activity, the Circuit found the minor plaintiff's allergy did not fit within the first definition of disability. <u>Id.</u> at 425.

In <u>Keck v. NY State Office of Alcoholism and Substance</u> <u>Abuse Services</u>, 10 F. Supp. 2d 194, 196 (N.D.N.Y. 1998), plaintiff began experiencing health problems as a result of exposure to tobacco smoke and perfume, including sore throats, difficulty breathing, headaches, nausea, and an inability to concentrate. She was diagnosed as having Multiple Chemical Sensitivity, Environment Tobacco Sensitivity and perennial allergic rhinitis. Id. As in the present case, Keck alleged her sensitivities affected the major life activity of breathing. Id. at 199. Because the only effect her "disability" had on her was a tightening of the throat the district court found her condition was not severe. Id. Further, because she alleged no instances of "difficulty breathing outside of the work context" the court believed it could consider the disability only in the context of work as an affected activity. Finally, because her allergies did not affect her ability to engage in vigorous physical activity such as aerobic exercise and mountain hiking, plaintiff failed "as a matter of law to demonstrate her ability to breathe is impaired under the ADA." Id. See also Muller v. Costello, 187 F.3d 298, 314 (2d Cir. 1999) (where there was evidence plaintiff was active outside workplace, participated in many sports and worked as member of military reserve, proof of a breathing impairment based on second-hand workplace smoke aggravation of his asthma was insufficient). While plaintiff's failure to show evidence of the extent to which her smoke sensitivity precluded her from other jobs would have supported a grant of summary judgment, her perfume sensitivity, a substance which would be common in most office buildings, 29 C.F.R. Pt. 1630, App. at 1630.2(j), raised a question of fact whether she was "substantially limited in her ability to work within the meaning of the ADA." Keck, 10 F. Supp. 2d at 200.

The summary judgment record indicates Roudybush's office in the Louisa County Courthouse was damp and moldy at times. After the rains of 1993, the paint on the walls of her office bubbled, blistered and by 1996 developed a bluish-green color. (Pl. Ex. 4 at 11, 12, 15). Repairs were eventually attempted which were not entirely successful. Plaintiff was diagnosed by Dr. Marta Little as having allergies to dust mites, molds, and pollens. (Pl. Ex. 7). According to Dr. Little, plaintiff experienced allergic rhinitis and conjunctivitis in the Spring and if exposed to dust and mold. (Pl. Ex. 6). Damp conditions in Roudybush's office encouraged the presence of mold and dust mites. Plaintiff received allergen immunotherapy injections. (Id.). In the last, September 17, 1999 medical note in the summary judgment record, Dr. Little described plaintiff's symptoms as

minimal runny nose, sneezing or nasal itch. She has sinus infections characterized by pressure pain of the face and discolored nasal secretions around 4 times in the past year; treated with one or two courses of antibiotic each. A new symptom in the last 2 months is excessive tearing, especially of the L eye. She has no other ocular symptoms.

(Pl. Ex. 8). Plaintiff described her symptoms as facial pain, headaches, sore throat and sinus infections. (Def. Ex. D at 20). She has said that her symptoms did not affect her job performance. (Pl. Ex. 2 at BJR 11-45).

Breathing is a "major life activity." <u>Land</u>, 164 F.3d at 424. The words "substantially limits" indicate a limitation which is "considerable" or to "a large degree" and exclude impairments which have a minor effect. <u>Toyota Motor Manuf. Kentucky, Inc. v. Williams</u>, 534 U.S. 184, _____, 122 S. Ct. 681, 691 (2002). These terms are to be interpreted strictly to confine the ADA to those persons within the scope of the legislative findings and purposes of the Act. <u>Id</u>. The EEOC's regulations define "substantially limits" as "significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity" as compared to the average person. 29 C.F.R. § 1630.2(j)(1)(ii). See Albertson's, 527 U.S. at 564.

The medical records do not indicate Roudybush's breathing has been significantly restricted in relation to the norm. They are largely without comment on the nature or severity of Roudybush's condition except in a couple of instances which suggest the

impairment varies with conditions and is not severe. On May 6, 1997, Dr. Little wrote that plaintiff's chronic allergic rhinitis (nose irritation or inflamation) was "currently well controlled." (Pl. Ex. 6). On September 17, 1999, plaintiff had "minimal runny nose, sneezing or nasal itch." The same note indicated plaintiff's four sinus infections in the past year had been treated with antibiotics. (Pl. Ex. 8). Dr. Little's records also indicate that flare-ups in plaintiff's allergies are seasonal or periodic, in the Spring or after periods of heavy rain. The conjunctivitis (pink eyes) diagnosed by Dr. Little is unrelated to breathing. There is no evidence Roudybush's facial pain, headaches or sore throats have caused any breathing difficulty.

The Court's attention has not been directed to any testimony in Roudybush's deposition about breathing problems. When asked by the Iowa Civil Rights Commission what her physical limitations were, plaintiff responded in relevant part: "During wet weather spells when I would be in the office more anyway rather than at the construction sites, I would suffer from headaches and nosebleeds." (Pl. Ex. 2 at BJR 11-45). In the final analysis, plaintiff's medical records and her own testimony are far short of supporting a finding that Roudybush's allergies have substantially limited her major life activity of breathing.

The evidence is also insufficient to support a finding that plaintiff's allergies have substantially limited the major

life activity of working. Plaintiff did not have any work restrictions in her work for the county. She could perform all of her job duties. As noted, she has said her job performance was not affected. (Ex. 2 at BJR 11-45).

[A] person is substantially limited in the major life activity of working if [the person] is "significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills, and abilities." 29 C.F.R. § 1630.2(j)(3)(I).

Webb v. Garelick Mfg. Co., 94 F.3d 484, 487 (8th Cir. 1996); see

Aucutt v. Six Flags Over Mid-America, Inc., 85 F.3d 1311, 1319 (8th
Cir. 1996). The EEOC regulations further define a "class of jobs"
as

[t]he job from which the individual has been disqualified because of an impairment, and the number and types of jobs utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment.

29 C.F.R. § 1630.2(j)(3)(ii)(B); Martin v. State of Kansas, 996 F. Supp. 1282, 1290 (D. Kan. 1998).

It follows that "'working' does not mean working at a particular job of that person's choice." <u>Wooten</u>, 58 F.3d at 386; see <u>Miller v. City of Springfield</u>, 146 F.3d 612, 614 (8th Cir. 1998) ("substantially limited in working requires a showing that . . . overall employment opportunities are limited"); <u>Gerdes v. Swift-Eckrich</u>, Inc., 125 F.3d 634, 637 (8th Cir. 1997); <u>Smith v.</u>

City of Des Moines, 99 F.3d 1466, 1474 (8th Cir. 1996); 29 C.F.R. \$ 1630.2(j)(3)(i) ("the inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working"). "An impairment that disqualifies a person from only a narrow range of jobs is not considered a substantially limiting one." Wooten, 58 F.3d at 386 (quoting Heilweil v. Mount Sinai Hosp., 32 F.3d 718, 723 (2d Cir. 1994), cert denied, 513 U.S. 1147 (1995)).

There is no evidence in this summary judgment record tending to support the conclusion that plaintiff is significantly restricted from working in a class or broad range of jobs, or that her overall employment opportunities are limited by her allergies. Roudybush is now attempting to work as a real estate agent and has said she is not able to show homes with wet basements or damp conditions. These limitations, however, do not render her incapable of working as a real estate agent, much less in a class or broad range of jobs.

Plaintiff has not generated a genuine issue of material fact about whether she is disabled within the meaning of either the ADA or ICRA. Defendants' motion will be granted with respect to Counts III and IV.

Defendants argue that plaintiff's disability claims are properly cognizable only under the workers' compensation statute. Iowa Code ch. 85. See St. Luke's Hospital v. Gray, 604 N.W.2d 646,

652 (Iowa 2000). It is not necessary to decide this issue, but the argument makes the point that neither the ADA nor ICRA create causes of action for personal injury. See Smith v. Blue Cross Blue Shield of Kansas, 102 F.3d 1075, 1077-78 (10th Cir. 1996), cert. denied, 522 U.S. 811 (1997); Garcia-Paz v. Swift Textiles, Inc., 873 F. Supp. 547, 556 n.6 (D. Kan. 1995). That the employer causes the disabling condition is beside the point under both statutes. The ADA and ICRA address discrimination and accommodation issues regardless of the cause of the disabling condition.

IV.

Defendants' motion for summary judgment is denied with respect to Counts I and II and is granted with respect to Counts III and IV. This matter shall come on for trial as scheduled on October 7, 2002 in Davenport, Iowa.

IT IS SO ORDERED.

Dated this 24th day of September, 2002.

KOSS A. WALTERS

CHIEF UNITED STATES MAGISTRATE JUDGE